In the

Supreme Court of the United States

STANDARD BRANDS, INC., a corporation, *Petitioner*,

vs.

J. F. BATEMAN, J. W. GALBREATH, E. J. DAVIS, JAMES H. MOORE and C. G. BENSON, Statutory Trustees of BATEMAN, INC., a Dissolved Corporation, *Respondents.*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

No. 490.

I.

STATEMENT OF THE CASE.[1]

A corporation, now dissolved, and of which plaintiffs are the statutory trustees (pleaded R. 1 and admitted R. 6), owned a building on June 26, 1946, which was then occupied by defendant as its tenant (R. 35, Plaintiffs'

[1]Since, in the petition (including the brief in suport), there are statements unsupported by any record citations, or by those given, or by any part of the record, and material facts are omitted therein which are necessary to a proper consideration of petitioner's reasons for granting the writ and respondents' reasons for its denial, we will assist the Court by submitting a brief statement of all material facts necessary for a consideration of the points raised in the petition, supported by record citations. For clarity, since the record refers to the trial, we will refer to petitioner, Standard Brands, Inc., as defendant and to respondents, J. F. Bateman, *et al.*, as plaintiffs.

Ex. 19, R. 37-42, offered R. 37). On said date the building was damaged by fire (R. 80).

Suit was thereafter instituted by plaintiffs' predecessor corporation against the defendant, and the parties proceeded to trial upon the issues raised by plaintiffs' second amended petition (R. 1-5) and the answer thereto (R. 6-7). This petition was in two counts each praying for recovery against the defendant of damages in the amount of $39,875 for injury to the building by the fire (R. 1-5).

Count I was an action for breach of contract, based upon paragraphs 2, 3, 5 and 6 of the lease, and parts of each of the said paragraphs were specifically set out in said count (R. 2). Count I also *mentioned,* in a statement inclosed in parentheses, that the *entire* lease had previously been filed as an exhibit to the *original* petition, *an abandoned pleading* (R. 2).

Count II was an action in tort for the alleged negligence of defendant causing plaintiffs' building to be damaged (R. 4-5). It incorporated all pertinent allegations of Count I (R. 4).

Count I was dismissed before the case was submitted to the jury (R. 324) and the case was submitted to the jury only on Count II of the petition[2] (R. 324).

During the course of the trial, plaintiffs introduced the lease in evidence, showing that under paragraph two thereof, the defendant was required to make certain repairs (Plaintiffs' Ex. 19, R. 37-42, offered R. 37).

The plaintiffs proved that the fire was caused by the negligence of either Blosser (an employee of Midwest Refrigeration, Inc. (R. 43), whom the defendant had hired (R. 43, 298) to perform the repair work referred to above) or Schrader (an employee of defendant), or

[2]Therefore, only the petition and answer as to Count II should be considered in ruling on petitioner's contention as to the pleadings.

the negligence of both, and the court instructed the jury that the defendant was liable for the negligence, if any, of either[3] (R. 318). The damage was proved to be as much as sued for (R. 183). The jury, by its verdict for plaintiffs (R. 322), found that either Blosser or Schrader, or both, were negligent.

At the close of plaintiffs' evidence, and at the close of all the evidence, defendant moved for a directed verdict (R. 201 and 306), and after the jury returned a verdict for the plaintiffs, it moved for judgment in its favor in accordance with its motion for a directed verdict (R. 325). All of the motions alleged the same grounds which will hereinafter be discussed in greater detail.

[3]This instruction as to Blosser was proper because defendant could not delegate the duty it owed plaintiffs, so as to escape liability for the negligence of employees of independent contractors, because (1) the duty to repair was imposed by contract (Plaintiffs' Ex. 19, par. 2, R. 38, offered R. 37), and (2) the work to be done by said employee was inherently dangerous, and each of these reasons made the defendant liable to plaintiffs for the negligence of Blosser under Missouri law, as hereinafter briefed under point 3 of the argument Since the defendant admitted at the trial and [illegible] the Court of Appeals that Blosser was negligent, the Court of Appeals held that it was immaterial, as between plaintiffs and defendant, whether Schrader was also negligent, since the defendant was liable for Blosser's negligence, and it admitted that Blosser was negligent, the Court stating: "Neither is it material on the question here presented whether the explosion was due to the negligence of Schrader * * *" (R. 345).

II.

ARGUMENT.[1]

The petitioner has advanced three reasons in support of its contention that a writ of certiorari should issue from this Honorable Court to correct alleged error on the part of the Court of Appeals. These contentions will be argued by the respondents in the same order in which they have been presented by the petitioner.

1. The Court of Appeals correctly followed the principles established by the Supreme Court of the United States in ruling that a defense, not pleaded or otherwise raised at the trial, nor affirmatively disclosed on the face of the petition, is waived and cannot be urged as grounds for reversal.

The point which petitioner seeks to raise under its first point is that the principles of pleading established by the Supreme Court of the United States are violated by the opinion of the Court of Appeals wherein it held:

> "In its *reply brief* defendant contends that it is absolutely liable for failure to maintain the interior of the rented building because under paragraph 7 of the lease betweeen the parties plaintiff landlord is required to repair fire damage. This contention was *not pleaded* in the answer *or otherwise asserted* in the trial court. No ruling thereon by the trial court is shown nor properly raised in this court. The ques-

[1]The petitioner has failed to comply with Rule 38 (2) of this Honorable Court by commingling its petition and brief. This in itself is a sufficient reason for denying the writ. The rule permits annexation of the brief to the petition, not commingling thereof. This is important because we could save the Court's time by disregarding errors claimed in the brief, but not asserted as reasons for granting certiorari in the petition, if we could determine where the petition ends and the brief begins. *Connecticut Ry. & Lighting Co.* v. *Palmer*, 305 U. S. 493, l. c. 496-497, 59 S. Ct. 316, l. c. 319-320, 83 L. Ed. 309, l. c. 312-313. Rule 38 (2) also so provides. Ordinarily the brief could at least be said to begin after the prayer for review by certiorari, but petitioner's prayer for certiorari begins on the first page of the petition. We will herein refer to pages of the combination petition and brief as (Br.....).

tion cannot, therefore, properly be said to be before us. *Dayton-Goose Creek Ry. Co.* v. *United States,* 63 U. S. 456, 496 (and other cases cited)" (italics ours) (R. 345).

The opinion shows that the petitioner thought so little of its contention as to paragraph 7 of the lease that it did not even raise this point until its *reply brief* in the Court of Appeals.

It now states that the quoted portion of the opinion is an incorrect statement of the law because it "did not follow the principles established" by this Honorable Court, although the Supreme Court case cited therein supports the opinion. The petitioner really is contending that the quoted portion of the opinion is an incorrect statement of the *facts* of the case. In other words, it contends that it *did plead* the purported defense and *did assert* it in the trial court.

Since petitioner's contention is actually that the opinion of the Court of Appeals is an incorrect statement of *fact,* rather than of *law,* this is sufficient ground for denying the petition for certiorari as to reason one. This Honorable Court has held that it will not issue a writ of certiorari where it turns on a *factual* dispute, and where, as here, the *facts* have been determined adversely to the petitioner's contention by the Court of Appeals. *Allen* v. *Trust Co. of Georgia,* 326 U. S. 630, l. c. 636, 66 S. Ct. 389, l. c. 392, 90 L. Ed. 367, l. c. 370.

In the event this Honorable Court desires to pursue the matter further, however, we will hereinafter show that the *facts* of the opinion are correct.

Let us consider first, the factual statement in the opinion that the defense was *not pleaded.*

Rule 8(c) of the Federal Rules of Civil Procedure designates an assumption of risk defense as a defense

which must be specifically pleaded in the answer. Petitioner's purported defense under Par. 7 is obviously in the nature of an assumption of risk defense. Even if it were not to be so considered, said Rule 8(c) requires *all* affirmative defenses to be specifically pleaded and a contract defense to respondents' tort action (on which the case was submitted to the jury, R. 324) is certainly an affirmative defense. Petitioner's answer (R. 6-7) discloses that it did not specifically plead said defense.

However, some authorities hold that Rule 8(c) is not the exclusive manner in which an affirmative defense may be raised. Such authorities state "* * * *if the defense affirmatively appeared on the face of the pleading* relied upon as stating grounds for relief, such pleading could be attacked *by demurrer or its more modern equivalent.*" Cyclopedia of Federal Procedure, 2d Ed., Vol. 4, Sec. 1303, p. 633.

Petitioner vaguely implies that paragraph 7, its purported defense "affirmatively appeared" on the face of the second amended petition. This is erroneous (R. 1-5).

In order so to find, petitioner would require the Court to retrace a most circuitous and devious path through a labyrinth of pleadings, consisting of a reference in an active count to *pertinent allegations* of an *abandoned count,* which is interdependent upon an exhibit to a still previously *abandoned petition* and which further requires a finding that the exhibit to the *abandoned pleading* was incorporated in or made a part of the *abandoned count.*

Let us attempt to trace defendant's arguments. Since Count I was dismissed (R. 324), only Count II may be considered in determining whether the defense was pleaded. 41 Am. Jur., Pleading, Sec. 135, p. 383. Paragraph 7 was *not* specifically pleaded in Count II (R. 4-5).

Petitioner's argument must be, therefore, that paragraph 7 was incorporated into Count II by respondents' pleading whereby it incorporated in Count II "* * * all the *pertinent allegations* of its first count * * *" (italics ours) (Par. I, R. 4).

This argument is fallacious because the only paragraphs of the lease deemed to be "pertinent" enough to be pleaded in Count I were paragraphs 2, 3, 5 and 6 (R. 2).

Petitioner's argument goes further, however, and states that the entire lease was incorporated into Count I. This is an erroneous argument, because (1) plaintiffs *could not do so*, and (2) plaintiffs *did not do so*.

Plaintiffs *could not do so* because the lease was not an exhibit to the second amended petition, but was an exhibit to an abandoned pleading, and a party cannot incorporate into an active pleading an exhibit to an abandoned pleading. *Oppenheimer, et al.*, v. *J. E. Young & Co., Inc., et al.*, 3 F. R. D. 220, l. c. 226, Point 15.

Plaintiffs *did not do so*, because the only reference to the entire lease in Count I is as follows (R. 2): "(That a copy of said lease is marked Exhibit 'A,' attached to the original petition filed herein.)" This mere reference in the second amended petition to an extraneous record did not incorporate same therein. In order to accomplish such a purpose (if it *could* be done), plaintiffs would have to employ such language as "incorporated herein," or "made a part hereof." Cyclopedia of Federal Procedure, 2d Ed., Vol. 4, Sec. 1444, p. 713. If plaintiffs had attempted to rely, at the trial, upon paragraphs other than those specifically pleaded (*i.e.*, 2, 3, 5 and 6), an objection would have been properly sustained that such other paragraphs were not pleaded.

Petitioner's argument as to the pleadings should not be sustained as the purpose of pleadings is to present the issues and not to conceal them.

Assuming, *arguendo,* that the defense was affirmatively pleaded in Count II of the second amended petition, the petitioner still did not avail itself of the proper means of raising such defense because it did not file the "modern equivalent of a demurrer," *i.e.,* a motion to dismiss the second amended petition, as required by the rule quoted from Cyclopedia of Federal Procedure, 2nd Ed., Vol. 4, Sec. 1303, p. 633.

Having shown that the facts stated in the Court of Appeals' opinion are correct, in that petitioner did not *plead* paragraph 7 as a defense, let us consider whether the opinion is also correct in stating that no defense based upon said paragraph was "*otherwise asserted in the trial court.*"

A careful search of the record fails to reveal any comment made concerning par. 7 during the trial. The defendant did not, in any of its objections, contend that under par. 7 plaintiffs were required to repair fire damage.

Furthermore, the trial court did not instruct the jury as to par. 7. At the conclusion of the court's charge, it asked the defendant if it desired to request any additional instructions, and the defendant declined to so request (R. 319).

The only claim petitioner even asserts to show it raised the defense in the trial court is that its motion for a directed verdict "* * * included as one basis for its allowance that the terms of the lease precluded a recovery against it" (Br. 3). An examination of the motion petitioner cites (R. 306) shows the only ground of said motion which refers to the lease is subdivision (a) thereof, which states:

> "Under the facts and the law plaintiffs are not entitled to recover under Count I or Count II in that by the terms of the lease introduced in evidence and

> under Missouri law the defendant Standard Brands, Inc., *is liable only for its negligence, which the plaintiffs have wholly failed to prove.*"[5]

Thus petitioner clearly did not in said motion contend that par. 7 was a ground for a directed verdict. The only contention it raised as to Count II was plaintiffs' failure to meet their burden of proof, because petitioner admits therein that if plaintiffs met their burden of proof as to its negligence, then it was liable therefor; whereas its argument as to par. 7 is that it is not liable, assuming it was negligent, because the landlord was required to repair fire damage. The inconsistence of the arguments shows that petitioner did not intend to raise par. 7 as a defense.

Furthermore, Rule 50 (a) of the Federal Rules of Civil Procedure provides:

> "A motion for a directed verdict shall state the *specific grounds therefor.*" (Italics ours.)

Yet petitioner raised no *specific ground* about the lease, but referred to it generally, except as qualified by the italicized portion of its motion. The defense, if it was one, was not "*otherwise asserted at the trial.*"

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[5]It is necessary to review the pleadings and Missouri law to show the Court the defense petitioner really attempted to raise in this portion of its motion. In Count I, respondents claimed that petitioner was liable for breach of contract, irrespective of negligence, because at the termination of the lease, petitioner failed to "* * * quit and surrender the demised premises in as good state and condition as received. * * *" (Par. 3, R. 2, Par. b, R. 3) as required by the lease. (Par. 3, Plffs.' Ex. 19, R. 39, offered R. 37). Under Missouri law, Mo. R. S. 1939, Sec. 3014, petitioner's contention was correct because that statute held that a tenant could be held liable, under such a lease provision, only for its negligence or the negligence of those for whom it was legally liable. Petitioner raised that contention as to Count I (later dismissed, R. 324), and as to Count II for negligence (on which judgment was had), it merely contended that plaintiffs had failed in their burden of proof as to negligence. It certainly did not, in the motion, raise a contention as to par. 7, because its statement as to the lease was qualified by the portion of the motion which we have italicized.

Had the petitioner believed it had a defense based upon par. 7, it would have been elementary for it to have requested the court to instruct the jury that under par. 7 of the lease the plaintiffs were required to repair fire damage, as it now contends, or for it to have requested a directed verdict *on that ground.*

The pleading and trial of a case is not a game in which parties litigant plead broadly and vaguely, concealing defenses and issues, omitting objections based on such hidden defenses, and raising broad, vague grounds for a motion of dismissal, in the hope that the jury will return a verdict in their favor, and trusting that if the jury returns a verdict against them, they will be able to get it set aside by raising their concealed defenses. We challenge the petitioner to show this Honorable Court one single place in the record where it invited the trial court's attention to par. 7 of the lease, or presented the theory to the trial court, which it now raises, that the plaintiffs were obligated to repair fire damage and therefore the defendant was absolved from liability.

The rule in this regard is well stated in Simkins Federal Practice, 3rd Edition, Sec. 1002, p. 720, as follows:

> "Where a case is tried on one theory, another theory may not be substituted in the appellate court. The theory on which the case was tried must be determined from the method in which the trial was conducted, evidence offered, objections made, and rulings of court invoked, and not by argument offered at the conclusion of the trial."

For like authority see *Helvering* v. *Wood,* 309 U. S. 344, l. c. 349, 60 S. Ct. 551, l. c. 553-554, 84 L. Ed. 796, l. c. 799; and *Bovay* v. *Fuller,* 63 F. 2d 280, l. c. 284, pt. 9 (C. C. A. 8th, 1933).

Furthermore, even if this Honorable Court should hold

that par. 7 was pleaded as a defense and was raised at the trial, it cannot affect the merits of the case and no injury resulted from the failure of the trial court or the Court of Appeals to consider it, because it is obvious that said paragraph[6] merely granted plaintiffs an option, in case of fire, either to repair the fire damage or to terminate the lease. Plaintiffs exercised their option and terminated the lease term by canceling it by mutual agreement (Ptffs.' Ex. 19, R. 41, offered R. 37). Thus, the plaintiffs, by terminating the lease term, relieved themselves of any liability to repair and the alternate question of whether plaintiffs could have recovered the cost of repairs from the defendant for a fire caused by its negligence, in the event they had exercised their option to repair, becomes moot.

As to such nonprejudicial error (if it could be construed to be error), Title 28, U. S. C. A., Sec. 2111, provides:

> "On the hearing of an appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

This Honorable Court held to the same effect in *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, l. c. 259, 42 S. Ct. 475, l. c. 477, 66 L. Ed. 927, l. c. 930, in the following language:

> "But mere error, without more, is not enough to upset the judgment, if the record discloses that no injury could have resulted therefrom."

[6] "7—In case of fire, the tenant shall give immediate notice thereof to the landlord who shall thereupon cause the damage to be repaired with reasonable speed, *but if the premises are so damaged that the landlord shall decide not to rebuild, the term of this lease shall cease at the option of the landlord and accrued rent shall be paid by the tenant up to the time of any such destruction by fire.* The tenant agrees to permit the landlord or its agents to show the premises to persons wishing to hire or purchase same during ordinary business hours." (Plaintiffs' Ex. 19, R. 40, offered R. 37.) (Italics ours.)

Petitioner states that risk of fire was to be borne by fire insurance companies and both parties knew this. This is absolutely not true and there is not a scintilla of evidence in the record to support it. Plaintiffs' predecessor corporation contemplated that it *might* carry fire insurance for which it would pay the premiums, and therefore placed a prohibition in the contract against defendant causing its fire rates to be increased (Ptffs.' Ex. 19, Par. 6, R. 39-40, offered R. 37). This provision was for the benefit of plaintiffs, not defendant, and plaintiffs were *not required* to carry fire insurance by the terms of the lease. In the absence of such a specific requirement, and a specific agreement that defendant was to receive the benefit of said insurance, defendant is not relieved of liability for its negligence.

In *Landau* v. *Fred Schmitt Construction Co.*, 237 Mo. App. 908, l. c. 918, 179 S. W. 2d 138, l. c. 142 (1944), the court aptly held:

> "To permit a defendant wrongdoer to profit or reap any advantage from plaintiff's insurance would be to allow a wrongdoer to pay nothing and take the benefit of a policy of insurance for which it had paid no part of the premium—in other words—to reap where it had not sown. (Citing cases.)"

We will not discuss this matter in greater detail inasmuch as it is not actually within the scope of the reason assigned by the petition as a ground for issuing the writ of certiorari.[7]

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[7]Reason 1 of petitioner does not disclose a ruling of the Court of Appeals as to paragraph 6 of the lease and petitioner does not take exception to any ruling of the Court of Appeals on insurance matters, although both matters are referred to loosely *after petitioner begins its citation of cases* (Br. 7). We therefore deem these to be matters not properly before the Court and will not take up the Court's time with a complete brief as to them. This Honorable Court sits as a Court of Review with regard to certiorari matters and is entitled to the benefit of a ruling of the court

2. The judgment of the Court of Appeals is not in conflict with the case of *Anderson & Brown Co.* v. *Anderson*, 161 F. 2d 974 (C. C. A. 7th, 1947), but is in conformity with that decision.

In the Anderson case, *supra*, the court merely held that the plaintiff could not receive recovery *in a contract action*, under a contract which was unenforceable because of uncertainty or invalidity.

The case is not in point because the defendant in the instant case has never contended that the lease contract was unenforceable because of uncertainty or invalidity. The Anderson case, in our opinion, correctly states the law, but it is not in point, and therefore there is no conflict. Plaintiffs' case was submitted on tort, not on contract, and the entire contract was not pleaded in the petition nor disclosed on the face thereof. The reasons given and authorities cited under point one of this brief apply with equal force to petitioner's argument under its second point, which is repetitious of point one. In the Anderson case the defense was called to the trial court's attention, as was not done in the instant case.

Even if there were a conflict, the petitioner could not have been harmed thereby, because par. 7 of the lease does not give rise to a defense against plaintiffs' tort action as heretofore shown.

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below, which the *petition* must assign as being erroneous, *Duignan* v. *United States, et al.*, 274 U. S. 195, l. c. 200, 47 S. Ct. 566, l. c. 568, 71 L. Ed. 996. Petitioner should not be allowed to circumvent the rules of this Court and its decisions by supplying these deficiencies in a reply brief that respondents will be unable to show is not supported by the record or the law, so as to uphold the opinion of the Court of Appeals.

3. The opinion is not in conflict with the case of *General Mills, Inc.* v. *Goldman*, 184 F. 2d 359 (C. C. A. 8th, 1950), and even if it were, such conflict would not be a reason for granting certiorari, because the respective decisions were founded on the substantive law of different states and the decisions were both made by the Court of Appeals for the Eighth Circuit and therefore do not involve a conflict between circuits. The opinion also is not in conflict with Missouri decisions.

Petitioner really has grouped two reasons for granting certiorari under one heading; however, we will follow its outline.

Assuming, *arguendo,* that the *General Mills* case, *supra,* and the instant case are in conflict, this would be no reason for granting certiorari, because the respective decisions were based on the substantive law of different states.

The *General Mills* opinion, *supra* (Page 363), discloses that the case was governed by substantive law of Minnesota. The opinion of the Court of Appeals in the instant case discloses (R. 341) that it is governed by the substantive law of the State of Missouri.

In Hughes, Federal Practice, Jurisdiction and Procedure (1931 edition), Vol. 8, Sec. 6301, p. 538, the rule is stated:

> "It would not do merely to show * * * a holding on a question of local law against the weight of authority. Local law in this connection refers to state law. * * * As to such cases, the Circuit Court of Appeals may be required to follow one state one day, and another the next day."

This Honorable Court has held that as to questions controlled by state law, conflict among circuits is not of itself a reason for granting a writ of certiorari. *Mullins* v. *N. Y. Life Ins. Co.,* 1938, 304 U. S. 202, l. c. 206-209, 58 S. Ct. 860, l. c. 861-863, 82 L. Ed. 1290, l. c. 1292-1294.

Further, if the *General Mills* case and the case at hand are in conflict, that would not involve conflict between Courts of Appeal of different circuits, as both cases were decided by the Court of Appeals for the Eighth Circuit. In Hughes, Federal Practice, Jurisdiction and Procedure (1931 edition), Vol. 8, Sec. 6301, p. 538, it is stated:

> "The rule requires that the conflict be between two Circuit Courts of Appeals * * *."

Furthermore, factually, the *General Mills* case and the instant case are entirely different. In the *General Mills* case the decision was bottomed on a lease which provided that the tenant would return the premises at the end of the term in as good condition as when the lease commenced "* * * *loss by fire* and ordinary wear *excepted.*" (Italics ours.) The lease in this case contained no such exception in the case of fire, but *only* excepted "reasonable wear and tear thereof and damages by the elements." (Par. 3, Plffs.' Ex. 19, R. 39, offered R. 37). Damage by the elements cannot be construed to include damage by fire caused by defendant's negligence, but only damage caused by an Act of God. Therefore, the basis for the *General Mills* decision is absent in this case. It should be noted that in the General Mills case the pleadings were different than in the instant case, in that the defendant affirmatively pleaded that the terms of the lease absolved it from liability for damage by fire. The evidence also revealed entirely different facts. While there are other distinctions, it is submitted that the foregoing are sufficient to show the decisions are not conflicting.

Further, petitioner stated in its petition for rehearing before the Court of Appeals of the Eighth Circuit that its two opinions were in conflict (R. 355-361), and by

overruling the petition for rehearing (R. 379), the Court, in effect, held its opinions were not in conflict.

Petitioner's last assigned reason why certiorari should be granted apparently is that the Court of Appeals' opinion conflicts with Missouri decisions in holding petitioner liable for the negligence of Blosser. It is doubtful if this point is properly raised by the petition, but if so it is waived in petitioner's brief by its failure to cite Missouri authorities it considers applicable. In its brief it cites only one Missouri case, *which it states is not in point,* and then cites authorities as to the general weight of authority in other jurisdictions.[8] Even if the opinion did conflict with the general weight of authority in other jurisdictions, it would not be a ground for certiorari on a point controlled by state law. Hughes, Federal Practice, Jurisdiction and Procedure (1931 edition), Vol. 8, Sec. 6302, pp. 547-548; Sec. 6254, p. 513.

Despite petitioner's waiver of the point, we would like to call the Court's attention to *Missouri decisions* which support the decision of the trial court and the opinion of the Court of Appeals.

In *Eberson* v. *Continental Investment Co.*, 118 Mo. App. 67, l. c. 73, 93 S. W. 297, l. c. 299 (1906), the Court held:

> "The principle is universally recognized that where a duty is incumbent upon one to do a particular work, he cannot escape liability for its negli-

[8]Petitioner's failure to cite Missouri decisions places respondents in an awkward position. They cannot file a reply to any reply brief that petitioner may file and therefore find themselves in a position where they will not be able to point out defects in any Missouri decisions petitioner may cite in its reply brief. Respondents could stand on the inapplicability of petitioner's citations in its original brief, and the resultant waiver. The petitioner might conceivably cite Missouri decsions in its reply brief, however, which the Court might accept in the absence of contrary authority cited by respondents. Respondents therefore pray the Court's indulgence while they lengthen their brief to include applicable Missouri decisions.

gent performance by committing its execution to an independent contractor."

For like authority holding that one cannot delegate a personal duty owed by contract to an independent contractor and escape liability therefor, see: *Morton* v. *William Barr Dry Goods Co.*, 120 Mo. App. 377, 103 S. W. 588, l. c. 592 (1907); *Phegley* v. *Graham*, 358 Mo. 551, 215 S. W. 499, l. c. 503; and *O'Hara* v. *Laclede Gas Co.*, 131 Mo. App. 428, 110 S. W. 642, l. c. 645 (1908). The above doctrine was extended still further in Missouri in *Bloecher* v. *Duerbeck*, 333 Mo. 359, 62 S. W. 2d 553 (1933).

Furthermore, regardless of its contractual duty, defendant was liable for the negligence of Blosser under Missouri law because of the *inherently dangerous work* required to be done. The air conditioning machinery on which Blosser was working had an unusual wiring arrangement which required special precautions to be taken (R. 143, 171-172) in order to prevent the escape of a highly explosive and inherently dangerous gas contained therein (R. 143, 163, 175, 279). The machinery was located within ten feet of an open flame (R. 288). The unusual wiring arrangement could not have been discovered without extensive search (R. 153) and was not known by Blosser to exist (R. 92, 93), although Schrader knew it existed (R. 287), but failed to warn Blosser (R. 112, 287).

The combination of these conditions made the repair work to be done by Blosser *inherently dangerous*, as admitted by defendant's own expert witness (R. 249).

The law is settled in Missouri that a contractee is liable for injuries caused by an independent contractor, employed by it to do *inherently dangerous work*. *Johnson* v. *J. I. Case Threshing Machine Co.*, 193 Mo. App. 198, 182 S. W. 1089 (1916), and *Galentine* v. *Borglum*, 235 Mo.

App. 1141, 150 S. W. 2d 1088 (1941). The Court of Appeals so held (R. 343).

This Honorable Court has refused to grant certiorari on similar grounds. In *In re Woods, et al.*, 143 U. S. 202, l. c. 206, 12 S. Ct. 417, l. c. 418, 36 L. Ed. 125, l. c. 126, based upon the substantive law of Minnesota, this Honorable Court held:

> "But we do not regard the inquiry as to * * * whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of this case, as falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the circuit court of appeals in reference to them."

It is submitted that the same consideration applies to the questions raised by the petitioner, which are shown, upon close examination, to be matters as to which the law in both the Federal and Missouri courts has been settled against petitioner's contentions.

Conclusion.

It has been shown that the instant case was correctly decided and the petitioner was properly held liable to respondents for the negligence of its employee, Schrader, or of its contractee's employee, Blosser. That under the substantive law of Missouri, petitioner was liable for Blosser's negligence—even though his negligence was the sole negligence. This rule of law is equitable, because it does not allow a party who has contracted to do certain

repairs and on whose financial responsibility the other contracting party depended, to shift its liability, imposed by contract or the inherently dangerous repairs to be made, to an independent contractor who may or may not be financially responsible."

The petition is thus shown to be without merit, and manifestly was sued out merely to delay proceedings on the judgment of the lower court, and respondents, therefore, respectfully request the Court to allow them damages in the amount of ten per cent as provided by Rule 30(2) of this Court, which is made applicable to petitions for writs of certiorari by Rule 44 of this Court, in addition to interest upon the amount of the judgment rendered in the trial court and affirmed by the Court of Appeals.

There is another petition for a writ of certiorari before this Honorable Court in this instant case, which involves the question as to whether the Court of Appeals after affirming the judgment of plaintiffs, made a correct ruling in directing that the case be remanded for a new trial on the issue of whether defendant was entitled to judgment over against third party defendant, Midwest Refrigeration, Inc., for the amount of said judgment. This issue does not concern plaintiffs as they were

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"The only case cited by petitioner under its Point 3, ***Bailey*** **v.** ***Zlotnick***, 149 F. 2d 505 (C. C. A. D. C. 1945), provides:

> "The effect of the cases which strictly limit the landlord's liability enables him to avoid a large part of the risks involved in making repairs and improvements and to compel an injured tenant to seek out and sue a contractor with whom he has had no dealings and who may not be financially responsible."

The same consideration applies herein, except that, in the instant case, it is the *landlord* who is seeking recovery, and the *tenant* who was contractually bound to make the repairs.

entitled to judgment against defendant regardless of whether the fire was caused by negligence of defendant's own employee, Schrader, or third party defendant's employee, Blosser.

As between defendant and third party defendant, it may be important (1) as to whether Blosser was negligent, and (2) whether Schrader was contributorily negligent.

As to plaintiffs this is immaterial, because defendant admits Blosser was negligent (Br. 3).

As stated in *Beave* v. *St. Louis Transit Co.*, 212 Mo. 331, 111 S. W. 52 (1908):

> "* * * the respondent is not responsible for errors committed by the court in giving or refusing instructions declaring the rights of the defendants among themselves. He took no part in that, and could not have prevented the action of the court in that regard. If error it was in giving said instruction, plaintiff, adopting the quotation as made in the brief of counsel for respondent, could but sit 'like patience on a monument, smiling at grief.'"

Therefore, even if this Court should grant certiorari on the issues between the *defendants,* it should refuse to grant *this* petition for certiorari and should allow respondents to collect their judgment against petitioner *now*—irrespective of whether petitioner can thereafter be reimbursed by third party defendant for the amount it is obligated to pay.

It is therefore respectfully submitted that this case was correctly decided and does not involve matters of such gravity and general importance as to merit review

by certiorari and that the petition for a writ of certiorari should be denied.

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